



JUTA'S ADVANCE NOTIFICATION SERVICE

APRIL 2012

Dear South African Law Reports and Criminal Law Reports subscriber

Herewith the cases of interest in the April reports. Also included below are the table of cases and flynotes.

JUDGEMENTS OF INTEREST IN THE APRIL EDITIONS OF THE SALR AND THE SACR

SOUTH AFRICAN LAW REPORTS

Dispute with municipality ends in darkness

The Supreme Court of Appeal looks at whether a municipality is entitled to disconnect the electricity supply of residents who refuse or fail to pay their rates and taxes, and whether the municipality can do this without a court order, and even where the electricity accounts of such residents are not in arrears. *Rademan v Moqhaka Municipality and Others* 2012 (2) SA 387 (SCA)

No price set for 'right' of repurchase

A farmer sold his farm to another farmer and in the deed of sale it was agreed that he could buy his farm back, but no price for this 'right' was reflected in the deed of sale. The court was called to decide whether failure to appreciate that a contract was void or voidable was a 'fact' for the purposes of s 12(3) of the Prescription Act 68 of 1969. *Claasen v Bester* 2012 (2) SA 404 (SCA)

Business rescue for companies: prospects of success

Two judgments look at the requirements for business rescue: the evidence needed to show a reasonable prospect of rescue, the costs and resources required, and the meaning of the term 'reasonable prospect' in s 131(4) of the Companies Act 71 of 2008. *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) and *Koen And Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC)

SOUTH AFRICAN CRIMINAL LAW REPORTS

The weight of previous inconsistent statements

The time has come for the rule, limiting the use of prior inconsistent statements to impeaching the credibility of the witness, to be replaced by a new rule recognising the changed means and methods of proof in modern society, that is, that they may be used as evidence of the truth of the matter stated therein. This will be in keeping with the development in other democratic societies. *S v Mathonsi* 2012 (1) SACR 335 (KZP)

An intermediary is not an interpreter

The function of an intermediary is to mediate the questions put to the witness, not the answers given by the witness. The intermediary is not conveying the evidence to the court as does an interpreter. The approach in certain decided cases to the role of the intermediary is that, if the intermediary is not sworn in, as an interpreter is, it amounts to an irregularity.

Requiring an intermediary to discharge this function under oath is a salutary practice, but if this is not done, an irregularity does not occur. *S v QN* 2012 (1) SACR 380 (KZP)

Police use of deadly force: sufficient time to respond to police warning

A homeowner and his wife reversed their car from their home while it was being ransacked by armed robbers. The police thought that the robbers were inside the car and opened fire, riddling the car with bullets. Did the police give the occupants of the car enough warning, and did they give them enough time to react to that warning, before opening fire? *Kotze v Minister of Safety and Security* 2012 (1) SACR 396 (GSJ)

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Kind Regards

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Search and seizure—Search—Search warrant—Validity—Provisions of ss 20 and 21 of Criminal Procedure Act 51 of 1977 striking balance between need for search and seizure powers and right to privacy of individuals—Such provisions providing sufficient safeguards against unwarranted invasion of right to privacy—In legal proceedings relating to validity of warrant, where constitutionality of ss 20 and 21 not attacked, starting point is whether warrant complies with relevant statutory provisions—Two criteria for validity that apply to all warrants are that warrant must be intelligible or capable of being understood and must authorise no more than permitted by authorising statute.

S v MATHONSI (KZP)

MADONDO J and SISHI J
2011 JANUARY 4; JULY 26

Evidence—Witnesses—Hostile witness—Previous inconsistent statement by—Rule limiting use of such statement to impeaching credibility of witness to be replaced by rule that it may also be used as evidence of truth of matter stated in statement—Previous inconsistent statement admissible for such purpose, if (1) evidence contained therein would be admissible if given in court; (2) statement made voluntarily and not result of undue pressure, threats or inducements; (3) statement made in circumstances in which witness would understand importance of telling truth; (4) statement is reliable and has been fully and accurately transcribed; and (5) statement made in circumstances where witness would be liable to prosecution for giving deliberately false statement.

S v QWABE (WCC)

NDITA J and S OLIVIER AJ
2010 FEBRUARY 12; MAY 11

Robbery—Aggravating circumstances—Sentence—Minimum sentence in terms of s 51 of Criminal Law Amendment Act 105 of 1997—Previous conviction of robbery (without aggravating circumstances)—Whether accused to be sentenced to minimum of 20 years' imprisonment in terms of s 51(2)(a)(ii) of Act—Words 'any such offence' in s 51(2)(a)(ii) referring to offence of same 'kind or degree' as offence for which sentence to be imposed—Previous conviction in present case therefore having to be one of robbery with aggravating circumstances before s 51(2)(a)(ii) applicable—Section 51(2)(a)(ii) of Act therefore not applicable—Sentence of 20 years' imprisonment imposed by magistrate replaced with one of 15 years' imprisonment.

Words and phrases—'Any such offence'—Meaning of in s 51(2)(a)(ii) of Criminal Law Amendment Act 105 of 1997—Held to mean offence of same 'kind or degree' as offence for which sentence to be imposed—Thus where accused convicted of robbery with aggravating circumstances, previous conviction which would require s 51(2)(a)(ii) to be applied would have to be one of robbery with aggravating circumstances—Previous conviction of robbery (without aggravating circumstances) not sufficient.

NAIDOO AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER (CC)

NGCOBO CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MOGOENG J, MTHIYANE AJ, NKABINDE J, VAN DER WESTHUIZEN J and YACOOB J
2011 MAY 24; AUGUST 10
[2011] ZACC 24

Prevention of crime—Restraint order in terms of Prevention of Organised Crime Act 121 of 1998—Application for under s 26—Whether legal expenses of defendant payable from property held by person other than person against whom restraint order made—On proper interpretation of s 26(6), read with s 26(1), of Act, not a plausible interpretation that access can be given to property held by person other than person against whom restraint order has been made—Provision for such expenses in s 26(6) narrowly and finely crafted and should not readily be overridden.

S v EVILIO (GSJ)

VAN OOSTEN J and MAHALELO AJ
2011 OCTOBER 14

Escaping from custody—Contravention of s 51(1) of Criminal Procedure Act 51 of 1977—Onus on State to prove lawful arrest of accused—That an essential element of charge—Accused not denying that he was arrested—That cannot and does not constitute proof of arrest on which State failed to lead evidence.

S v KRUGER (SCA)

HARMS AP, SHONGWE JA and PLASKET AJA
2011 NOVEMBER 23, 29
[2011] ZASCA 219

Sentence—Imposition of—Factors to be taken into account—Aggravating factors—Fact that offences committed within short period (*in casu* eight months) after expiry of parole period an aggravating factor.

Sentence—Imposition of—Factors to be taken into account—Cumulative effect of sentences imposed on more than one count—Order that sentences run concurrently—Fact that offences committed at different places and different times may be consideration against ordering concurrence of sentences—But that factor cannot justify failure to factor in cumulative effect of sentences—Court must tirelessly balance mitigating and aggravating factors to reach appropriate sentence.

Sentence—Imposition of—Factors to be taken into account—Cumulative effect of sentences imposed on more than one count—While destitution is no justification for turning to crime, it

may be mitigating factor when balancing cumulative effect of whole sentence where there are multiple convictions.

Sentence—Imposition of—Factors to be taken into account—Period spent in prison awaiting trial—Fair to take such into account in determining appropriate sentence, especially where such period lengthy.

S v MATHEBULA AND ANOTHER (SCA)

MTHIYANE JA, MAYA JA and BOSIELO JA

2011 SEPTEMBER 5, 29

[2011] ZASCA 165

Sentence—Prescribed sentences—Minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Discretion in terms of proviso to s 51(2) of Act to impose sentence exceeding prescribed minimum—Discretion to be exercised judicially and on reasonable grounds—Court to give reasons for departing from prescribed minimum sentence—In absence of such reasons, conclusion inescapable that decision arbitrary or that discretion not exercised judicially—Appeal court should not have to speculate on reasons which motivated sentencing court to depart from prescribed minimum—Such would be subversive of principles of openness, transparency, accountability and fairness.

Sentence—Prescribed sentences—Minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Discretion in terms of proviso to s 51(2) of Act to impose sentence exceeding prescribed minimum—Court, in judgment on sentence, should identify on record aggravating circumstances which cause it to impose sentence greater than prescribed minimum and explain why such circumstances justify departure from prescribed sentence.

S v QN (KZP)

WALLIS J, GORVEN J and NGWENYA AJ

2011 MAY 4, 27

Evidence—Witnesses—Calling, examination and refutation of—The oath—Admonition to speak the truth—Section 164(1) of Criminal Procedure Act 51 of 1977—Requirement for implementation of s 164(1) is that witness does not understand import of oath or affirmation—Effect of such lack of understanding not inadmissibility of evidence of witness but that court to consider whether witness competent—Evidence of such witness competent if requirements of section satisfied.

Evidence—Witnesses—Calling, examination and refutation of—Intermediary—Section 170A of Criminal Procedure Act 51 of 1977—Swearing in of intermediary—Analogy between intermediary and an interpreter false—Purpose of s 170A met by intermediary mediating questions put to witness, and not answers given—Not correct that, if intermediary not sworn in, it amounts to irregularity—But practice of swearing in intermediaries not to be denigrated as it serves salutary purpose—If oath administered to intermediary, it should be to honestly and faithfully and to best of ability to discharge function of intermediary.

KOTZE v MINISTER OF SAFETY AND SECURITY (GSJ)

HARTFORD AJ

2011 AUGUST 30

Arrest—Use of deadly force in effecting arrest—Lawfulness of—Requirement that police alert the suspect that an attempt to arrest him being made—Suspect must be given an opportunity to react to that before force is employed—Criminal Procedure Act 51 of 1977, s 49(2).

S v LANGENI (ECG)

PAKADE ADJP and ANDREWS AJ

2011 MARCH 2; JULY 14

Robbery—Sentence—Effect of cumulative sentences—Accused having committed two armed robberies over a period of a year—Accused having assembled an arsenal of weapons in order to commit the robberies—Accused having attempted to kill his victims—Court ordering cumulative sentence of 43 years' imprisonment to run concurrently, rendering it an effective sentence of 30 years' imprisonment—In view of the gravity of offences court on appeal upholding sentence.

DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG, PRETORIA v THUSI AND OTHERS (SCA)

MTHIYANE JA, VAN HEERDEN JA and SHONGWE JA

2011 SEPTEMBER 6, 29

[2011] ZASCA 176

Sentence—Prescribed sentence—Minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—‘Substantial and compelling circumstances’—Youthfulness—Must be weighed against objective gravity of offences, their prevalence in South Africa and the legitimate expectations of society that such crimes had to be seriously punished.

Sentence—Prescribed sentence—Minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—‘Substantial and compelling circumstances’—Prospects of rehabilitation—Must be weighed against objective gravity of offences, their prevalence in South Africa and the legitimate expectations of society that such crimes had to be seriously punished.